STATE OF MICHIGAN

IN THE SUPREME COURT

CLAM LAKE TOWNSHIP, a Michigan general law township; and HARING CHARTER TOWNSHIP, a Michigan charter township,

Appellants,

v

THE STATE BOUNDARY COMMISSION, an administrative agency within the Michigan Department of Licensing and Regulatory Affairs; TERIDEE LLC, a Michigan limited liability company; and, THE CITY OF CADILLAC, a Michigan home rule city,

Appellees.
_____/

Supreme Court Docket No. 151800

Court of Appeals Case No. 324022

Wexford County Circuit Case No. 14-25391-AA
Honorable William M. Fagerman

State Boundary Commission Docket 13-AP-2

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APPELLANTS' <u>THIRD</u> REPLY BRIEF:

REPLY TO THE BRIEF IN OPPOSITION OF APPELLEE, THE CITY OF CADILLAC

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Clam Lake Township and Haring Charter Township (the "Townships") submit this Reply Brief, pursuant to MCR 7.302(E), in rebuttal to the Brief filed by Appellee, the City of Cadillac (the "City"). Some of the City's arguments are the same as those advanced by Appellees, TeriDee, LLC and/or the State Boundary Commission ("SBC"), which the Townships have already addressed in their Reply to TeriDee's and the SBC's Briefs. Accordingly, the Townships confine this Reply to the different or additional arguments that the City advances in its own Brief.

REPLY TO THE CITY'S INTRODUCTION

In order to attack the Townships' Act 425 Agreement, the City has attempted to create a number of false narratives in its introduction, the first of which is that Clam Lake has done "everything in its power to block economic growth" on the Transferred Area. City Answer at p. 1. The City's dissembling is made readily apparent when one considers the undisputed facts.

First, some correct historical context is needed in order to properly understand why the Townships have had nothing to do with any historical impediments that TeriDee might have faced, with regard to developing the Transferred Area. It is undisputed that, about seven years ago, TeriDee knowingly and voluntarily purchased property that (a) was not in the City, (b) was without City public water or public sewer, (c) was planned for over 20 years for Forest Recreation ("FR"), (d) was zoned FR, and (e) had been denied commercial zoning or planning twice previously. But the Townships have had nothing to do with creating or continuing those circumstances. The FR zoning/planning was imposed by the County, not the Townships.[1] And it was *the SBC*, not the Townships, who just recently decided, on October 3, 2012, that TeriDee's property should *not* be a part of the City because this would be *unreasonable* under the standards of MCL 123.1009. In this accurately-framed context, the City's attempt to hold the Townships up as evil straw men must be rejected. The only thing the Townships have done is to *expand* economic development opportunities

[1] Clam Lake does not presently exercise zoning powers; it is subject to County zoning. **ROP at 4D**.

for the Transferred Area, by implementing development standards that allow a reasonable amount of commercial development at the highway intersection, and by supporting that development through the concurrent provision of Haring water and sewer services to the Transferred Area, while ensuring that the existing residents in nearby subdivisions are protected from the new commercial development by appropriate screening, buffers and landscaping.

The City's second false narrative is that the purpose of the Townships' Agreement is to "block development" on the Transferred Area, simply because it would not allow TeriDee to develop the property with "big box" and "mid-box" stores, in contravention of the regional land use plan.[2] The City's position is directly contrary to the plain language of Act 425. In the list of factors that are to be considered before local units enter an Act 425 agreement (*see* MCL 124.23), there is no mention whatsoever of private development interests. And there is no requirement that the economic development project be the exact same project that one particular developer wants. Instead, the local units are required to consider "the relationship of the proposed action to any established city, village, township, county, or regional land use plan." MCL 124.23(c). Thus, simply because the Townships do not want to violate the regional land use plan (as TeriDee and the City are specifically proposing), this does not equate to "blocking" development. The Townships have instead entered an Agreement that implements an economic development project that is *consistent* with the regional land use plan, which is exactly what the Legislature intended, as stated in MCL 124.23(c).

REPLY TO COUNTER-STATEMENT OF FACTS

The City alleges that, in the circuit court, the Townships accused the Attorney General ("AG") of accepting a "bribe" from TeriDee. City Brief at p. 9. In truth, the Townships never used that word. What the Townships did, instead, was to bring the circuit court's attention to a disturbing

[2] The circuit court expressly held that TeriDee's development plan "is contrary to regional land use plans." *See* 12/19/14 Opinion on Appeal at p. 12. Appellees have not appealed that holding.

pattern of *undisputed* facts, as follows:

- On May 14, 2013, just before TeriDee applied for annexation, the owners of TeriDee began to make, *for the first time*, a series of substantial monetary contribution to the AG, which is the *only* political office involved with SBC decisions. *See* Twp Supp Appeal Brief (circuit court, 10/6/14) at Tab I.
- This series of political donations (which TeriDee acknowledged to be $2,000) culminated with the owners of TeriDee serving as "hosts" of a private, political fundraising event for the AG on August 8, 2013. **ROP at 8D** (7-Day Rebuttal at Tab M)
- TeriDee's owners hosted this event in Cadillac (*id*.), even though they do not live in the Cadillac region. Generous "host" donations of $500 were required to be paid. *Id*. This was done while the annexation petition had already been pending before the SBC since June 5, 2013. Thus, the AG was accepting political money from TeriDee's owners at the same time his office was advising the SBC on TeriDee's annexation petition.
- Just after TeriDee's owners had a private, paid-for meeting with the AG at the August 8, 2013 fundraiser in Cadillac, the owners of TeriDee were so confident that their annexation petition was going to be approved that they quickly erected a sign on their property (**ROP at 6D**, Tr. at p. 24), announcing that their project was "Coming Soon", and would include "big-box" and "mid-box" stores. **ROP at 7C** (30-Day Subs at Exb. 19).

The above facts are *undisputed*. And simply because the Townships pointed out these undisputed facts to the circuit court, the City now accuses the Townships of making claims of "bribes." Again, the Townships have never used that word. That is the word that the City has chosen to use as a description of what, in its own view, is necessarily concluded by the above facts.

The City also alleges that, in the circuit court, the Townships accused the AG's office of concealing documents, but that the Townships never substantiated this. City Brief at p. 9. It is correct that the Townships made this argument, but contrary to what the City alleges, the Townships proved this to be *undisputedly* true. The circuit court pleadings reveal that the Townships had to file a Motion to Correct and Amend the ROP on August 18, 2014 (brief in support filed 8/21/14) because the AG was refusing to include, in the ROP, documentary evidence that the Townships had submitted to the SBC before its decision, showing that the Haring WWTP was already under construction. This raised the specter that the SBC was potentially not including *other* relevant documents that the Township did not already know about, and so the Townships' Motion also sought

to compel the SBC to supplement the ROP with *all* records and documents of the SBC proceedings. At a hearing on September 8, 2014, the circuit court granted the Townships' Motion, with a written Order subsequently entered on September 16, 2014. The result of this was that the SBC was forced, on September 29, 2014, to supplement the ROP with two additional 3-ring binders of material that it had previously withheld – measuring five inches thick – thus nearly doubling the size of the ROP.

Significantly, included in the supplemental ROP materials were documents showing that the Chairman of the SBC, Dennis Schornack, made false statements at the April 16, 2014 adjudicative session. Specifically, with respect to Mr. Schornack's statement that the Haring WWTP was "[p]otentially fictional . . . no bonds have been issued or anything. There's no engineering studies" (**ROP at 11D**, Tr. at pp. 53-54), the records in the supplemental ROP show that, when Mr. Schornack made that statement, he was already in possession of information showing that (a) the construction bonds had already been issued, (b) the engineering studies were complete, (c) the construction permits had already been issued by the MDEQ, and (d) the Haring WWTP was on schedule to be available for service by July 2015. *See* Appellants' Supp Appeal Brief (circuit court, 10/6/14) at pp. 9-11, and Tabs F-H. Is it any wonder why the SBC tried to exclude these documents from the record?

In any case, the circuit court records show that the Townships were absolutely correct in their suspicions: the SBC had concealed thousands of pages of documents from the circuit court and the parties, including, specifically, records showing that the SBC Chairperson was either ignorant of the content of the ROP, or was knowingly making false statements. Either way, the SBC's incompetence to determine the validity of an Act 425 agreement was on full display. This is just another reason the Court should grant leave to appeal and thereby reverse *Casco Twp*[3], so that Act 425 is not left in the hands of an agency having no competence to administer or apply that statute.

[3] *Casco Twp v SBC*, 243 Mich App 392; 622 NW2d 332 (2000), *app den*, 465 Mich 855 (2001).

REPLY ARGUMENTS

I. *CASCO TWP* WAS CORRECTLY DECIDED ONLY TO THE EXTENT THAT IT DETERMINED THE *CASCO* AGREEMENTS WERE INVALID

The City tries to make much of the fact that the Townships stated below that *Casco Twp* was correctly decided on its particular facts, suggesting that the Townships thereby consented to its dictum. City Brief at p. 11. The City is engaging in obfuscation. The Townships repeatedly attacked *Casco Twp's* dictum in the lower court proceedings. *See*, e.g., Twp Reply to City (circuit court, 9/25/14) at pp. 2-5. What the Townships *actually* did in the lower court proceedings[4] (as they continue to do now), is to acknowledge that the *Casco* agreements were, in fact, invalid, because they did not satisfy the minimum criteria of Act 425 – they did not include an economic development project, *at all*, and were entered by townships that had no independent ability to extend sewer or water services to the transferred areas. But that is nothing like the Townships' Agreement, which includes an economic development project, and which was entered by townships that (through Haring) have the independent ability to extend sewer and water to the Transferred Area, in full satisfaction of Act 425. Thus, as *Casco Twp* correctly noted, the Townships' Agreement is a "statutory bar to the [SBC's] consideration of an annexation petition" because it "fulfills the statutory criteria [of Act 425]." *Casco Twp* at 398-99. The Court should so hold.

II. THE CITY IS MISAPPLYING THE MOOTNESS DOCTRINE

The City invokes mootness as a reason for denying the Townships' Application, arguing that it is "impossible" for the Court to grant effective relief because, in order for the Agreement to be deemed valid, the Townships must also prevail in their *other* appeal, now pending before the Court of Appeals in Docket No. 324022, which involves the separate legal question of whether the Agreement impermissibly binds Haring's legislative zoning authority, by contract. City Brief at pp. 11-12. The City is misapplying the mootness doctrine in this respect.

[4] *See*, e.g., Appellants' Brief on Appeal (circuit court, 8/21/14) at p. 30.

While it is true that the Townships will also need to prevail in COA Docket No. 324022 in order to have their Agreement become fully valid, that does not mean this appeal is moot. This is because an appeal is *not* moot if the action complained of will continue to adversely affect the appellant "in some collateral way." *Matter of Estate of Dodge*, 162 Mich App 573, 584; 413 NW2d 449 (1987). That rule is directly implicated here because, without relief from this Court in the form of an order vacating and/or reversing the SBC's decision to invalidate the Agreement, the Townships will, as a collateral matter, be unable to obtain effective relief in their pending appeal in COA Docket No. 324022, thus stripping the Township of a legal remedy in that case. This is the precise type of adverse collateral impact that the Court has previously recognized will *not* moot an appeal, where reversal of an administrative decision is first needed, as a prerequisite to effectively defending in a collateral legal action. *See McMullen v Sec of State*, 339 Mich 175; 63 NW2d (1954).

The *McMullen* case involved a situation where the appellant was appealing, in one action, the secretary of state's administrative revocation of his driver's license, on the ground that he never received proper notice of the revocation hearing. *Id*. at 177-178. The secretary of state argued that the appeal was moot because, while the appeal was pending, the appellant's driver's license had already expired. *Id*. at 178. In response, the appellant argued that the appeal was not moot because, while his appeal was pending, he had been cited, in a separate action, for driving under a revoked license. *Id*. And because the appellant could not challenge his citation in that separate action unless he first obtained a declaration that the secretary of state's revocation decision was void for lack of proper notice, he argued that he would suffer the adverse collateral consequence of not being able to effectively defend against the charge that he was driving on a revoked license. *Id*. This Court agreed with the appellant, holding that the pendency of the separate action, in which the appellant first needed the secretary of state's revocation decision to be voided as a prerequisite to challenging his citation, prevented a finding of mootness. *Id*.

The Townships point out that the Court most recently affirmed and approved the reasoning and holding of *McMullen* in *Calhoun County Clerk v Calhoun County Bd of Com'rs*, 428 Mich 867; 401 NW2d 49 (1987), in which the Court held that an appeal was *not* moot because the appellants remained bound by a circuit court order that adversely affected their legal rights. That is exactly the case here, where the Townships continue to be bound by the circuit court's invalidation of the Agreement (on other grounds) in the separate case pending in COA Docket No. 324022, such that the Townships need this Court to first vacate and/or reverse the SBC's unlawful invalidation of the Agreement in this action, as a prerequisite to the Townships being able to obtain effective relief in the separate appeal. This collateral impact prevents a finding of mootness; the City's contrary argument should be rejected, as being legally incorrect.

III. MICHIGAN DOES NOT APPLY "*CHEVRON* DEFERENCE" TO AN AGENCY'S DETERMINATION OF ITS OWN JURISDICTION

The City argues that *Casco Twp's* jurisdictional holding was correct because an agency should be afforded judicial deference when determining the scope of its own statutory jurisdiction. City Brief at pp. 14-15. In this respect, the City is tacitly relying on a doctrine that has been adopted by the federal courts, known as "*Chevron*[5] deference," whereby a federal court will defer, under *Chevron*, to an agency's interpretation of a statutory ambiguity that concerns the scope of agency's statutory authority. *See*, e.g., *City of Arlington v FCC*, 133 S Ct 1863, 1868 (2013). The City's position reflects two fundamental errors. First, this Court has expressly rejected "*Chevron* deference," as constituting an unconstitutional impingement on the judiciary's sole authority to determine the meaning of a statute. *In re Complaint of Rovas*, 482 Mich 90, 109-111; 754 NW2d 259 (2008) ("This Court has never adopted *Chevron* for review of state administrative agencies'

[5] *Chevron USA, Inc v NRDC, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

statutory interpretations, and we decline to adopt it now.").[6] This Court instead adheres to the rule that the scope of an agency's jurisdiction is a legal issue, subject to *de novo* review. *Rovas* at 90.[7]

Second, even if "*Chevron* deference" was the law in Michigan (which it is not), it applies only in circumstances involving an ambiguous statute. *City of Arlington* at 1868. But there is no ambiguity to be resolved here. The Michigan Legislature has not given the SBC *any* authority under Act 425; this is undisputed. Thus, even if *Chevron* was the law in Michigan, it would command a conclusion that the SBC has absolutely no jurisdiction to do *anything* with respect to Act 425 agreements. *City of Arlington* at 1882 (holding that *Chevron* deference applies "only when it appears that Congress delegated authority to the agency," and that "in the absence of such a delegation," agency action is "beyond the *Chevron* pale."). And the SBC cannot rely on its undoubted jurisdiction over annexation petitions (as granted by the State Boundary Commission Act) as a basis for exercising jurisdiction under a separate statute such as Act 425, because "it is fundamental that an agency may not bootstrap itself into an area in which it has no jurisdiction" by relying on a statutory delegation of jurisdiction over a different subject matter. *City of Arlington* at 1881-82. The correct legal conclusion, therefore, is that the SBC has no jurisdiction to do *anything* with respect to Act 425 agreements. The Court should so hold, in a peremptory ruling.

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[6] *See* also, LeDuc, Michigan Administrative Law (2015 ed.), §9:19, pp. 656-657 (explaining that the *Rovas* Court expressly rejected *Chevron* deference).

[7] The two cases cited by the City, *Judges of the 74th Judicial Dist v County of Bay*, 385 Mich 710; 190 NW2d (1971) and *Petition of Labor Mediation Bd v Jackson County Rd Comm'n*, 365 Mich 645; 114 NW2d 183 (1962), do not support a different conclusion. The *74th Judicial Dist* case stands only for the limited proposition that, based on the exhaustion doctrine, a court should not enter a preliminary injunction for the purpose of enjoining an administrative hearing before it occurs, on the basis of a pre-hearing jurisdictional challenge. *74th Judicial Dist* at 728-729. That principle is not implicated here, where the Townships seek only post-hearing relief. The *Labor Mediation Bd* case is even more inapposite. It stands only for the proportion that, in that particular case, the *Labor Mediation Board* properly determined that it had jurisdiction over the subject matter of the appeal. *Labor Mediation Bd* at 654-655. Neither case grants deference to an agency's determination of its own statutory jurisdiction. As noted in *Rovas*, Michigan has *never* adopted such a rule.

IV. THE CITY IS RELYING ON SBC "FINDINGS" THAT DO NOT EXIST

Similar to TeriDee, the City does a fine job of pointing out the obvious faults of *Casco Twp*. The City does this by citing to the various "findings" the *Casco* circuit court relied on to invalidate the *Casco* agreements (City Brief at p. 13, 2nd full paragraph) – *none* of which were made by the SBC, and which are therefore dictum, and which otherwise a reflect of an improper exercise of judicial authority. And also like TeriDee, the City jumps off the erroneous platform created by this particular aspect of *Casco Twp*, and therefore feels entitled to "invent" SBC findings that do not actually exist in this case, by claiming that the SBC "found that the Act 425 Agreement was a sham." City Brief at p. 19. There is no such SBC finding; it doesn't exist. **ROP at 13A**. And so once again, we see the dangerous precedent that *Casco Twp* has set, where members of the bar now find it perfectly acceptable – just as the *Casco Twp* court did – to invent non-existent SBC findings to justify its decisions, whenever the actual findings are insufficient to do so. This practice needs to stop, and this Court can now make that happen by properly overruling *Casco Twp*.

V. THE CITY IS MAKING IRRELEVANT AND FALSE ALLEGATIONS

The City has invented unique and novel ways to attack the Act 425 Agreement, alleging that it is invalid because: (a) Clam Lake has agreed to bear the cost of defending and implementing some aspects of the Agreement, (b) and the Townships are represented by the same attorney. City Brief at p. 20. These allegations are irrelevant because none of them bear on the validity of an Act 425 agreement. There is nothing in Act 425 stating either that (a) an agreement cannot include provisions relating to allocation of litigation or implementation costs[8], or (b) an agreement cannot be reached between two municipalities that share the same legal counsel. The Court would have to re-write Act 425 to invalidate the Townships' Agreement on either of these bases, which, of course, cannot be

[8] And to the contrary, §6 of Act 425 states that an Act 425 agreement may include provisions for responding to liabilities incurred in the performance of the agreement. MCL 124.26(f).

done. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63, 66; 642 NW2d 663 (2002) ("[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself . . . The role of the judiciary is not to engage in legislation.").

The City also falsely alleges that the Agreement makes Clam Lake "solely responsible" for paying and financing all of Haring's costs for water and wastewater infrastructure. City Brief at p. 20. That is incorrect. Under the Agreement, Clam Lake is responsible *only* for the initial cost of "extending [wastewater and water lines] to the Transferred Area." **ROP at 3C** (Agreement at p. 5). And the parties have agreed that Haring will reimburse Clam Lake for a proportion of those costs (*id*., Agreement at Art. II) through a development and payback agreement, by which Clam Lake will then reimburse TeriDee for a fair proportion of the upfront capital costs TeriDee expends to finance the extensions. **ROP at 8D** (7-Day Rebuttal at pp. 12-13). This Court should disregard the City's attempt to falsely portray the Agreement in any other manner.

REQUEST FOR RELIEF

For the additional reasons stated herein, the Townships respectfully request that this Honorable Court either peremptorily reverse and vacate the SBC's Decision, or grant the Townships' Application for Leave, to allow review after full briefing and argument.

Respectfully submitted,

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